EXHIBIT 21

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12   UNITED STATES DISTRICT COURT

13   NORTHERN DISTRICT OF CALIFORNIA

14   SAN FRANCISCO DIVISION

15

16 ORACLE AMERICA, INC.,   Case No. CV 10-03561 WHA

17   Plaintiffs,   **DEFENDANT GOOGLE INC.'S FIRST
                                             SUPPLEMENTAL RESPONSES AND
18   v.   OBJECTIONS TO PLAINTIFF'S
                                             INTERROGATORIES, SET 6 (NOS. 38-44)**
19 GOOGLE INC.,

20   Defendant.   Dept.   Courtroom 8, 19th Fl.
                                             Judge: Hon. William Alsup
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INTERROGATORY NO. 39:

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Identify all commercially acceptable, non-infringing substitutes to all or any of the 37 JAVA API PACKAGES used in ANDROID, all reasons for YOUR conclusion that such substitutes are commercially acceptable and non-infringing, and all reasons YOU did not use such substitutes in ANDROID.

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FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 39:

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In addition to its General Objections, Google objects to this Interrogatory as prematurely seeking information that is the subject of expert opinion testimony and discovery prior to the dates set by the Court in this matter. Google further objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, and/or any other applicable privilege, immunity, or protection. Google further objects to this Interrogatory as vague, ambiguous and potentially overbroad and unduly burdensome and not proportional to the needs of the case as to the terms "commercially acceptable," "substitutes," "37 Java API Packages," and "Android." Google further objects to this Interrogatory as overly broad, unduly burdensome, not relevant to any claim or defense in this lawsuit, and not proportional to the needs of the case to the extent that it seeks information related to operations of Google outside of the United States having no connection with the United States, and to the extent that it seeks information unrelated to the copyright infringement allegations set forth in Plaintiff's Amended and Supplemental Complaints. Google further objects to this Interrogatory as improperly compound and containing multiple distinct sub-parts. Google further objects to this Interrogatory as prematurely seeking expert opinion testimony prior to the date set by the Court in this matter. Google further objects to this Interrogatory to the extent it attempts to reopen discovery on issues, events, transactions, and/or occurrences that could have, and should have been addressed, if at all, prior to the original trial.

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Subject to and without waiving the foregoing objections and the General Objections, Google states that, at the time that Android was released in or around 2007 and thereafter, other possible approaches existed in regard to the development of Android, including but not limited to the use of other programming languages in lieu of the Java programming language in connection

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1   with certain Android core libraries. As such, if Google used a programming language other than

2   Java, Android could have been offered without incorporation of the SSO of the 37 Java API

3   Packages (and certain of the method headers reflecting that SSO) at issue in this lawsuit (hereafter

4   collectively the "SSO").

5   Google's use of the SSO in Android was and continues to be an entirely legal and fair use,

6   i.e., a non-infringing use, as discussed more fully in Google's responses and supplemental

7   responses to Interrogatory Nos. 11, 15, 20, 34, and 37 (all incorporated herein). And, as

8   discussed more fully in Google's responses and supplemental responses to Interrogatory Nos. 10,

9   12 and 30 (all incorporated herein), Oracle/Sun repeatedly, over the course of years, publicly

10 applauded and commended Google's release of Android and its use of the SSO. In fact,

11 Oracle/Sun viewed Android as "strapping rockets" on Java and advancing the Java community of

12 which Oracle/Sun was a part. It was only after Oracle acquired Sun and failed to successfully

13 build its own smartphone or smartphone platform that Oracle (years after Android's release)

14 reversed its position and sued Google over the release of Android. Given that Google's use of the

15 SSO was a legal and fair use, given that Google invested large amounts of money and employee

16 time in distributing Android, given that Google and other third parties built a thriving ecosystem

17 around the Android operating system, and given that Oracle/Sun itself praised and applauded

18 Android's release for years after its initial release, Google did not adopt other substitutes for the

19 SSO simply because Oracle unfairly and unlawfully decided to attempt to reverse its position on

20 its previous support of Android after Android became a well-established, open source platform

21 used by many third parties.

22   Moreover, prior to Google's public announcement and release of Android, Oracle/Sun

23 released (and continues to release) OpenJDK, which is a free and open source implementation of

24 the Java Platform, Standard Edition (Java SE) that contains (among other things) the SSO and is

25 made available under a free open source license, the GNU General Public License, version 2

26 (GPLv2), with the Classpath Exception. Pursuant to the GPLv2 with the Classpath Exception

27 license under which Sun/Oracle makes OpenJDK available, anyone, including Google, may copy,

28 modify, and distribute the SSO under the terms of the license for free. Accordingly, as will be

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1   discussed more fully during expert discovery, a non-infringing alternative available to Google

2   would have been to replace the allegedly-infringing SSO used by Google in Android with

3   licensed versions of the SSO incorporated from OpenJDK and distribute the licensed versions of

4   the SSO in Android pursuant to the terms of the GPLv2 with the Classpath Exception license. As

5   discussed more fully in the December 9, 2015 deposition of Anwar Ghuloum and Google's

6   second supplemental response to Interrogatory No. 37, served on November 12, 2015, Google has

7   already begun to develop Android versions using OpenJDK. The source code for Android

8   versions using OpenJDK was made available for inspection pursuant to the parties stipulated

9   Protective Order on a secured, source computer at the offices of Keker & Van Nest LLP.

10   In addition, as discussed more fully in the revised Expert Report of Dr. Gregory K.

11   Leonard dated October 24, 2011, which Google hereby incorporates by reference in its entirety, a

12   non-infringing alternative available to Google would have been to use a programming language

13   other than the Java programming language, such as C++, Objective C, C, Python, Ruby,

14   JavaScript, etc., as an applications programming language for Android. Indeed, Apple's iOS

15   platform has required and/or allowed developers to write their applications in Objective C, and

16   Apple is now transitioning to a new programming language called Swift. Google has allowed

17   developers to program applications for Android using applications programming languages other

18   than Java (e.g., C++) through the Android Native Development Kit (NDK). *See, e.g*,

19   http://developer.android.com/ndk/index.html.

20   In support of the above contentions, Google reserves its right to rely upon, and hereby

21   incorporates by reference, all facts set forth in the previous trial record in this matter, including all

22   trial transcripts and trial exhibits, any deposition testimony and exhibits preceding the previous

23   trial, and any briefing, or exhibits identified in briefing, preceding the previous trial. Google

24   further reserves the right to amend or supplement its response to this Interrogatory based on

25   further information provided during fact and/or expert discovery in this matter, including but not

26   limited to supplementation after completion of any depositions that occur after the close of

27   discovery by court order and/or stipulation of the parties.

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DEFENDANT GOOGLE INC.'S FIRST SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF'S INTERROGATORIES, SET 6
Case No. CV 10-03561 WHA

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1   **INTERROGATORY NO. 40:**

2   To the extent YOU contend that YOUR use of any aspect of the 37 JAVA API

3   PACKAGES constitutes fair use, state in detail the factual bases for that contention.

4   **FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 40:**

5   In addition to its General Objections, Google objects to this Interrogatory to the extent that

6   it seeks information protected by the attorney-client privilege, the work product doctrine, and/or

7   any other applicable privilege, immunity, or protection. Google further objects to this

8   Interrogatory as vague, ambiguous and potentially overbroad and unduly burdensome and not

9   proportional to the needs of the case as to the term "37 Java API Packages." Google further

10   objects to the extent that this Interrogatory prematurely seeks information that is the subject of

11   expert opinion testimony prior to the dates set by the Court in this matter. Google further objects

12   to this Interrogatory to the extent that it seeks discovery that should properly have been sought

13   during the original trial of this matter.

14   Subject to and without waiving the foregoing objections and the above General

15   Objections, Google states that its incorporation of the SSO of the 37 Java API Packages (and

16   certain of the method headers reflecting that SSO) at issue in this lawsuit (hereafter collectively

17   the "SSO") was and continues to be an entirely legal and fair use. In support of this contention,

18   Google reserves its right to rely upon, and hereby incorporates by reference, all facts set forth in

19   the previous trial record in this matter, including all trial transcripts and trial exhibits, any

20   deposition testimony and exhibits preceding the previous trial, and any briefing, or exhibits

21   identified in briefing, preceding the previous trial. Google further incorporates by reference the

22   entirety of its response to Interrogatory No. 11. Google further states that additional facts

23   supporting this contention also include but are not limited to the following:

24   - Google's use of the SSO was transformative in enabling a new and innovative

25   smartphone platform, as even Oracle witnesses have testified to in deposition. *See,*

26   *e.g.*, December 9, 2015 Deposition of Terrence Barr 134:11-138:16.

27   - Google's use of the SSO was also transformative in that Google did not simply re-

28   package or re-publish any copyrighted work. Rather, Google transformed the way

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DEFENDANT GOOGLE INC.'S FIRST SUPPLEMENTAL RESPONSES AND
OBJECTIONS TO PLAINTIFF'S INTERROGATORIES, SET 6
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1   the SSO may be used by expending tremendous resources writing the vast majority

2   of the source code for Android—including all of the implementation source

3   code—from scratch. Google put the SSO to a new purpose or use by creating a

4   modern, feature-rich smartphone platform that previously did not exist.

5   • Both before and after the launch of Android, Sun/Oracle recognized both in public

6   and private statements that Android was indeed a new and transformative

7   innovation and not a replacement or substitute for the Java SE platform. Sun's

8   CEO, Jonathan Schwartz stated that Google had "strapp[ed] rockets" onto Java,

9   and other Sun/Oracle employees repeatedly applauded, commended,

10   complimented, and encouraged Google on Android.

11   • Sun/Oracle repeatedly tried, and failed, to create a successful smartphone platform

12   using Java. Google, by contrast, built Android into an innovative and successful

13   smartphone platform—something that Sun/Oracle could not accomplish—and then

14   made Android available to others for free under an open source license, fostering

15   rapid innovation, and further transforming the SSO of the Java APIs.

16   • Both before and after the release of Android, Sun/Oracle, as well as others in the

17   industry, believed that the SSO was free to be used by others, provided they

18   created their own implementing source code. Consistent with the custom and

19   practice of the industry, and these industry expectations in general, Google

20   likewise believed that that the SSO was free to be used, provided it created its own

21   implementation.

22   • Sun/Oracle was aware of, encouraged, and promoted open-source independent

23   implementations of the Java APIs, including but not limited to, independent

24   implementations created by Apache Harmony and GNU Classpath.

25   • Sun/Oracle and others in the industry (e.g., IBM) used code derived from

26   independent implementations, including but not limited to GNU Classpath and

27   Apache Harmony, in commercial products. Sun/Oracle was obviously aware of its

28   own use of such code and it openly acknowledged and promoted others' use of

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1   such code, including, but not limited to, at Sun/Oracle's own JavaOne conference.

2   • The Java APIs, and thereby the SSO, are functional works, as they are essential

3   building blocks for using the free Java programming language and are necessary to

4   achieving interoperability. They are a functional command structure.

5   • The Java APIs are inseparable from, connected to, and/or dependent on the free

6   Java programming language, and therefore a reasonable copyright owner would

7   believe that Sun/Oracle had consented, and Sun/Oracle in fact did consent, to use

8   of the Java APIs by others, including but not limited to Apache Harmony, GNU

9   Classpath, and IBM.

10   • Sun/Oracle intentionally promoted the use of the Java APIs, and thereby the SSO,

11   in schools, textbooks, etc. as part-and-parcel with learning the Java language itself,

12   because Sun/Oracle wanted to broaden the universe of people who used the free

13   Java language and associated APIs.

14   • Oracle's 30(b)(6) witnesses have conceded in deposition testimony that the Java

15   APIs, and thereby the SSO, are an inseparable part of the Java programming

16   language, which is open and free for anyone to use. Oracle witnesses have also

17   testified that the Java APIs are connected to and dependent upon the Java

18   programming language.

19   • As discussed more fully in the Opening Expert Report of Dr. Owen Astrachan

20   dated July 29, 2011, many aspects of the SSO are themselves borrowed, derived,

21   or re-implemented, from programming languages and standards that preceded the

22   Java programming language, including (among other things) the method

23   declarations in the <math.h> and <stdlib.h> libraries of the C/C++ programming

24   languages, the syntax and semantics of regular expressions in the Perl

25   programming language, the class hierarchy and various class names of the

26   Smalltalk programming language, the naming conventions of POSIX socket

27   standards, the syntax and semantics of the POSIX printf() standard, and the

28   method declarations in the <ctype.h> library of the C/C++ programming

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1 languages.

2 • Prior to Oracle's purchase of Sun, Sun/Oracle considered it fair and proper for

3 another company to create an independent implementation of the SSO without a

4 license from Sun, so long as the resulting product was not called "Java."

5 • Prior to Oracle's purchase of Sun, Sun/Oracle was aware of several unlicensed

6 implementations of the SSO and, in fact, encouraged these independent

7 implementations.

8 • Google's use of the SSO was also a fair use because the purpose of Google's use

9 of the SSO was to achieve interoperability. Google chose to use the specific SSO

10 of 37 Java API packages, out of the 166 total API packages in the Java SE

11 platform, because those were the API packages that developers would expect to be

12 present in a smartphone. Use of the free and open Java language requires at least

13 some portion of the SSO, and other portions of the SSO are critical to make any

14 meaningful use of the language and/or meet industry expectations.

15 • As discussed more fully in the Opening Expert Report of Dr. Owen Astrachan

16 dated July 29, 2011, the SSO constitutes only a small part of the Java APIs and

17 Google used only the portions of the Java APIs that were necessary for mobile

18 applications. In particular, the SSO reflects only 37 of the 166 Java API packages

19 in the asserted copyrighted works, and the SSO represents only a tiny percentage

20 of the Android Core Libraries and the Android Platform.

21 • At most, Google's use of the SSO is only indirectly commercial. Google provides

22 advertising on smartphones and other devices running Android—as well as on

23 smartphones and other devices not running Android (e.g., iOS devices)—but the

24 SSO does not directly enable advertising or directly drive revenue to Google.

25 Google generates advertising revenue from the use of devices running Android and

26 other smartphone platforms, because of Google-owned and developed advertising-

27 related technology that has nothing to do with the SSO.

28 • Since Google's release of Android, Sun/Oracle has publicly acknowledged that

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1   Android has helped increase the popularity of the Java language and benefitted the

2   Java community as a whole. It was and always has been a part of Sun/Oracle's

3   business strategy to popularize the Java language and the Java APIs, so that the

4   base of individuals and products using the Java language was broader. Indeed,

5   Sun's CEO indicated that Google strapp[ed] rockets onto Java, and Terrence Barr,

6   a Java Evangelist at Sun and current Oracle employee, declared that Android

7   would benefit the Java programing language and the Java platform by "literally

8   guarantee[ing] Java remains the dominant platform for years to come."

9   • Furthermore, Sun/Oracle has benefited from Android by building or attempting to

10   build technology to work with, compliment, run on, or be accessed through

11   Android-based devices, including but not limited to applications that allow access

12   to Oracle sites and products, Java FX, Oracle Mobile Application Framework,

13   Application Development Framework, and plans to port Java to Android.

14   • Google's use of the SSO in Android did not harm the market for licensing the

15   SSO. Prior to Oracle's purchase of Sun, Sun/Oracle Sun's licensing practices did

16   not preclude Google from using the SSO in Android. To the contrary,

17   Sun/Oracle's business model was to promote widespread and free use of the Java

18   language and the associated APIs (including the SSO) and to compete on

19   implementations for those APIs (including the implementations of the 37 API

20   packages).

21   • Google's use of the SSO in Android also did not harm the market for the SSO by

22   fragmenting the Java SE platform, because by the time Android was released,

23   Sun/Oracle had already fragmented the Java SE platform itself by creating separate

24   versions of Java. In addition, by the time Android was released, Sun/Oracle had

25   already enabled the fragmentation of the Java SE platform by giving away the SSO

26   for free, and without any restrictions on fragmentation, through OpenJDK and the

27   associated GPLv.2 with the Classpath Exception open source license, which does

28   not require compatibility. Sun/Oracle's other Java platforms (e.g., Java ME) were

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1   fragmented before Android, as Oracle witnesses testified to in deposition. And

2   Oracle has announced plans to further fragment or "modularize" Java, including

3   but not limited to "Project Jigsaw."

4   • Sun/Oracle could not compete in the actual or potential market for mobile phones

5   because it failed to innovate and/or evolve the Java platform quickly enough to

6   keep up with rising demand for modern, feature rich smartphones with compelling

7   user interfaces. Sun/Oracle decreased investment in its Java mobile offerings,

8   abandoned efforts to build a mobile phone, and chose not to pursue other potential

9   market opportunities. Therefore, any market harm that Oracle has suffered is a

10   result of Sun/Oracle's own doing, and is not attributable to Google's use of the

11   SSO in Android.

12   • Android did not displace or supersede Java in the market, because Oracle did not

13   have a product that could actually compete in any market with Android. Because

14   Android is a full-stack smartphone operating system, it is very different from (and

15   superior to) Java SE and any other mobile Java product that Oracle has offered or

16   intends to offer.

17   • There is no evidence that any "market harm" or lost business opportunity of

18   Oracle's is due to Android's use of the SSO. Any such harm is due to the flaws in

19   Oracle's own products or strategy and/or the many desirable attributes of Android

20   that have nothing to do with the SSO. Indeed, Oracle witnesses have described

21   Oracle's Java strategy as "screwed up" or "failing," admitted that Java had

22   significant technical and business problems, and admitted that they were impressed

23   with Android and that Android was (in some respects) superior to Java.

24   • Oracle's 30(b)(6) witnesses have conceded that Android does not compete with

25   Java in many markets, and that they are not able to identify any instances where

26   Oracle lost a specific customer or business opportunity that it would have secured

27   absent Android's use of the SSO.

28   Google further states that Google's fair use is also evidenced by documents produced in

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1 this matter, including without limitation: GOOG-00000001-GOOG-00022378; GOOG-

2 00022389- GOOG-00103811; GOOG-00103817- GOOG-00542335; IBM000001 - IBM000039;

3 GOOG-10001898- GOOG-10002177 and GOOG-10002472-GOOG-10002515. Google reserves

4 the right to amend or supplement its response to this Interrogatory based on further information

5 provided during fact and/or expert discovery in this matter, including but not limited to

6 supplementation after completion of any depositions that occur after the close of discovery by

7 court order and/or stipulation of the parties. Google further incorporates the deposition testimony

8 of Terrence Barr, Donald Smith, and Mike Ringhofer. Google further incorporates by reference

9 its response to Interrogatory 30. Google reserves its right to rely upon, and hereby incorporates

10 by reference, all facts set forth in the previous trial record in this matter, including all trial

11 transcripts and trial exhibits, any deposition testimony and exhibits preceding the previous trial,

12 and any briefing, or exhibits identified in briefing, preceding the previous trial. Google further

13 reserves the right to amend or supplement its response to this Interrogatory based on further

14 information provided during fact and/or expert discovery in this matter, including but not limited

15 to supplementation after completion of any depositions that occur after the close of discovery by

16 court order and/or stipulation of the parties.

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18 **INTERROGATORY NO. 41:**

19   To the extent YOU contend that ANDROID has had and will have no effect upon any

20 actual or potential market for exploitation of any version of the Java Platform, state in detail the

21 factual basis for that contention.

22 **FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 41:**

23   In addition to its General Objections, Google objects to this Interrogatory as vague and

24 ambiguous due to its use of the terms "Android," "effect," "exploitation," and "Java Platform."

25 Google further objects to this Interrogatory as unduly burdensome or seeking information not

26 proportional to the needs of the case in failing to constrain the scope of the Interrogatory to

27 material at issue in this lawsuit. Google objects to this Interrogatory to the extent it seeks

28 information protected by the attorney-client privilege, the work product doctrine, and/or any other

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1 **INTERROGATORY NO. 42:**

2   To the extent YOU contend that YOU are entitled to an express or implied license defense

3 because YOUR use of any aspect of the 37 JAVA API PACKAGES is covered by any license

4 expressly authorized by Sun or Oracle, or because YOUR use of any aspect of the 37 JAVA API

5 PACKAGES was, is, or should be considered authorized under the circumstances despite the

6 lack of such a license, state in detail the factual basis for that contention.

7 **FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 42:**

8   In addition to its General Objections, Google objects to this Interrogatory to the extent it

9 seeks information protected by the attorney-client privilege, the work product doctrine, and/or

10 any other applicable privilege, immunity, or protection. Google further objects to this

11 Interrogatory as vague, ambiguous, nonsensical and overbroad due to its use of the terms "any

12 aspect of the 37 JAVA API PACKAGES," and "was, is or should be authorized under the

13 circumstances." Google further objects to this Interrogatory to the extent it purports to request

14 information unrelated to Android and the allegedly infringed material at issue in this lawsuit.

15 Google further objects to this Interrogatory as improperly compound and containing multiple

16 distinct sub-parts. Google further objects to this Interrogatory as unduly burdensome and not

17 proportional to the needs of the case to the extent it requests information, documents, and/or

18 things not within the possession, custody, or control of Google. Google also objects to this

19 Interrogatory as overly broad, unduly burdensome, not relevant to any claim or defense in this

20 lawsuit, and not proportional to the needs of the case to the extent that it seeks information related

21 to operations of Google outside of the United States having no connection with the United States,

22 and to the extent that it seeks information unrelated to the copyright infringement allegations set

23 forth in Plaintiff's Amended and Supplemental Complaints.

24   Subject to and without waiving the foregoing objections and the General Objections,

25 Google states that, with respect to this Interrogatory's query concerning the license defenses, the

26 Court dismissed Google's defense of implied license in its May 31, 2012 order. Google further

27 states that it does not assert the defense of express license as to any of the already-released

28 versions of Android. Google reserves its right to rely upon, and hereby incorporates by reference,

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1   all facts set forth in the previous trial record in this matter, including all trial transcripts and trial

2   exhibits, any deposition testimony and exhibits preceding the previous trial, and any briefing, or

3   exhibits identified in briefing, preceding the previous trial. Google further reserves the right to

4   amend or supplement its response to this Interrogatory based on further information provided

5   during fact and/or expert discovery in this matter, including but not limited to supplementation

6   after completion of any depositions that occur after the close of discovery by court order and/or

7   stipulation of the parties. Google further reserves the right to amend or supplement its response

8   to this Interrogatory based on further information provided during fact and/or expert discovery in

9   this matter, including but not limited to supplementation after completion of any depositions that

10   occur after the close of discovery by court order and/or stipulation of the parties.

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12   **INTERROGATORY NO. 43:**

13   To the extent YOU contend YOU incurred any expenses or costs associated with

14   YOUR revenues derived directly or indirectly from exploitation of ANDROID (including,

15   without limitation, from licensing and distribution of ANDROID, licensing and distribution of the

16   Android-compatible applications sold through the Google Play store or any digital content

17   sold through the Google Play store, and all mobile search advertising revenue earned by Google

18   in connection with the actual or potential use of any ANDROID device), identify all such

19   expenses or costs and explain in detail how they are causally related to the revenue produced.

20   **FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 43:**

21   In addition to its General Objections, Google objects to this Interrogatory as vague and

22   ambiguous as to the use of the phrases "exploitation of ANDROID" and "actual or potential use

23   of any ANDROID device." Google further objects to the Interrogatory to the extent it implies

24   that Android generates direct revenues; Android is an open source operating system offered for

25   free. Google further objects to this Interrogatory as prematurely seeking expert opinion testimony

26   and discovery prior to the dates set by the Court in this matter. Google also objects to this

27   Interrogatory as overly broad, unduly burdensome, not relevant to any claim or defense in this

28   lawsuit, and not proportional to the needs of the case to the extent that it seeks information related

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